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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1934.

No. 27.

HEGEMAN FARMS CORPORATION,
Appellant,

against

CHARLES H. BALDWIN, and others,
Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

We present no jurisdictional question. In connection with the joint motion to advance (same case, number 988 of preceding term) we called attention to the fact that although the law under which the present case arose has expired, it was replaced by a similar statute which is now effective. The original issue has not become academic. Of the original three defendants, still named as appellees, two are non-essential parties now; Dr. Parran because he no longer has any part in administration or enforcement of the statute, and Mr. Fee because his official duties now are subordinated to those of the third appellee, Commissioner Baldwin.

Question.

Is the property of the appellant taken in violation of the Due Process Clause by a statute and orders fixing

the minimum price which it must pay producers for milk, but not fixing a minimum resale price equal to its total costs of operation?

How the Question Arises.

This is an application for an injunction brought by a domestic corporation of the State of New York against officials of that State. The suit is one regulated by U. S. Code Title 28, §380, (formerly Jud. Code, §266). It was commenced in U. S. District Court, S. Dist. of N. Y., late in January, 1934, and on March 16th the District Court denied an injunction and dismissed the complaint. The opinion is reported at 6 F. Supp. 297, and is found in the Record, pages 54-57. By stipulation of the respective counsel the Court made findings of fact. (R. 57-59.) It also made brief conclusions of law. (R. 59-60.)

Facts.

The suit was instituted before *Nebbia v. New York*, 291 U. S. 502, was decided, and the first cause of action (R. 4-8) alleged in general terms the unconstitutionality of the New York milk control statute under the Fourteenth Amendment. Under point II of appellant's brief before this Court there is some argument against the constitutionality of the statute, but it seems to be related to the Commerce Clause. That matter will be discussed under point II of this brief, which answers the corresponding point in the appellant's brief.

The essentials of the second cause of action (R. 8-12) can be stated as follows: The appellant is a milk

dealer, buying milk from farmers in central New York State and reselling it to stores in New York City. By orders issued by the Milk Control Board the appellant was required to pay its producers about five cents a quart for milk, and the minimum price for resale to New York City stores was fixed at nine cents. The four cent difference was inadequate to cover freight and costs of operation. Appellant suffered a small loss; about four cents per hundred quarts. Competitive conditions made it impracticable for the appellant to charge more than the nine cent minimum. Its normal adjustment would have been to reduce the price paid producers, but there it was stopped by the order of the Board. Appellant asserted that the combined effect of the orders (or the effect of either operating upon the entire situation, including the other) was to take its property without due process of law.

The complaint alleged another matter incidentally to that major grievance. It appeared that the appellant had not actually paid its producers the price fixed by the Board, but had managed to pay them somewhat less over a period of months. Auditors from the Board exposed that fact, and the Board made orders revoking appellant's license as a milk dealer unless it paid its producers the unpaid balance of about $23,000. These orders were to have become effective on January 31, 1934, and it commenced this suit on January 30 by obtaining a show cause order and stay.

Although the complaint and affidavits filed by the appellant (R. 4-26, 47-53) and the answer and answering affidavits (R. 27-46) supply much more information, particularly technical material about the appellant's costs of operation, the foregoing summarizes

what is immediately relevant, and has the support in all essentials of the short findings of fact. (R. 57-59.)

Summary of Argument.

Point I. The orders were not unconstitutional. The resale price was only a minimum and nothing in the order fixing that price restrained the appellant from asking a greater price.

Point II. The statute was not unconstitutional in any matter of which the appellant can complain.

Point III. No claim is made that the appellant waived its right to attack the constitutionality of the orders merely by applying for a license under the statute. In some other respects it has waived and estopped itself.

POINT I.

The orders are not unconstitutional. The resale price was only a minimum and nothing in the order fixing that price restrained the appellant from asking a greater price.

This is substantially the only ground covered by the opinion below, and we rely heavily upon its reasoning. We shall not repeat it in this brief, but merely add a few observations by way of supplement.

Under the 1933 milk control law, and again under the 1934 law, the administrative officials are authorized to fix resale prices at which milk dealers can sell. These may be minimum prices or maximum prices or both.

Thus far no maximum price has been established; competitive conditions have been thought to render that unnecessary.

At what point should the minimum price be established? Clearly it should not be fixed high enough to yield a fair return on the operations of the least efficient dealers. That is the highest tolerable point for fixing a maximum price.

Should the minimum be high enough to yield a fair return to dealers of average efficiency? There is something to be said for and against that conclusion. Perhaps the minimum now involved was that high. There is no finding that the appellant is of average efficiency, although there is some material in the moving papers which probably is intended to yield that inference. (R. 24-25; appellant's brief page 11.)

Fixing the minimum price at the point where only the most efficient dealers can earn a fair return would seem to be the course most in the public interest. The pressure of competition will then compel efficiency as a necessary condition for survival. We submit that there is no constitutional objection to a minimum price fixed so low. Indeed, we believe that the very nature of a minimum price is such that the failure to fix any minimum price whatever is no constitutional grievance.

It is part of public knowledge that in 1933 the Agricultural Adjustment Administration sponsored milk marketing agreements and licenses in all of the principal cities of the nation outside of New York and New Jersey. Each of those arrangements provided for

minimum prices to producers and minimum resale prices. About December, 1933 Secretary Wallace withdrew the minimum resale prices. In his opinion they were doing more harm than good. Since then the Federal administration has been compelling milk dealers in Boston, Philadelphia, Chicago and many other places to pay producers certain minimum prices, and has not supported them by any resale prices.

The same change in policy, only less open and avowed, has taken place under NRA. The main purpose was to increase payrolls, and that was to be accomplished by limiting hours of work and fixing minimum wages. At the same time, as it happened, the costs of many raw materials were being put up by processing taxes under AAA, and the costs of machinery and other supplies were being increased by parallel operations of NRA. Industry was for a while given strong support through code provisions tending to fix minimum resale prices. More recently the resale prices are being dropped, and industry left to meet its costs as best it may. The cotton textile industry, for instance, is said to operate at a loss.

We make no argument as to the wisdom or the unwisdom of these things. If that is reasonably open to doubt the question is not a justiciable one. Probably the choice of course depends to some extent upon industry conditions and local conditions involved in each case. Even as to milk alone there are plenty of unsolved problems which can be solved only by administration. See an article in University of Cincinnati Law Review for May, 1934 (volume VIII, page 219), by Frank E. Horack, Jr. and Julius Cohen, entitled

"After the Nebbia case: the Administration of Price Regulation." The present case can be decided upon its own narrow facts.

It appears that the appellant, a dealer of undefined relative efficiency, selling milk to New York City stores at the minimum price of nine cents per quart, suffered a loss of about half a mill per quart. (R. 24; a loss of $.01605 per forty-quart can is about $.000401 per quart.) It was selling at the minimum price for sales for its class of business, which was *nine cents*. But it also appears that during the same period at least four of its competitors, including the three largest milk dealers in New York City, were making similar sales at *ten cents*. That was the minimum price applicable to them, and the difference between them and "unadvertised" dealers, such as the appellant, was owing to a peculiar statutory provision known as the "unadvertised differential." (R. 30-31.)

The constitutionality of that provision has been upheld in the case of *Borden's Farm Products Co. v. Baldwin*, 7 F. Supp. 352 (U. S. Dist. Ct., S. Dist. N. Y., June 6, 1934, opinion by Circ. Judge Learned Hand). That case will probably be before this Court in November and we shall not argue it now. We never have said much in support of the economic merit of the provision but it is not completely without a basis of reason. Appellant's brief devotes attention to it at pages 17-22. We wish to comment now only upon the difficulties which lie in the way of fixing a minimum resale price high enough to compel appellant to operate profitably, without at the same time compelling other dealers to operate at an outrageous profit. The "un-

advertised differential'' provision, the fact that there is considerable variance in the operating costs and efficiencies of various milk dealers, and that retail prices for milk ordinarily are expressed in cents per quart, without fractions, all contribute to those difficulties.

Appellant's proposition apparently is that the minimum price at which it could sell to New York City stores should have been set at 9.0401 cents per quart or more, to fit its operating costs. Let it be assumed that appellant is a dealer of average size and efficiency in the ''unadvertised'' class, and hence that there is something typical about its operating costs. Giving due weight to the fact that retail prices do not use fractions of a cent, and that there was something accustomed and fair about allowing the storekeeper a cent a quart for his service, the price that must be fixed to satisfy appellant's demand was 10 cents. That would mean not only that the appellant and dealers similarly situated would be compelled to take an excessive profit, but that the ''advertised'' dealers would be compelled to take another cent more than that excessive profit. Under those circumstances the minimum price would be elevated above the point justified for a maximum price.

Having regard to the purposes of a minimum resale price, and the difficulties of fixing one that will exactly meet all needs, we respectfully submit that the appellant has no ground to complain of the point at which this one was fixed. We submit also (but in this we go beyond the need of the present case) that the appellant would have no ground to complain if no mini-

mum resale price were fixed. The appellant's difficulties as to obtaining an adequate resale price are due, as was observed by the Court below, primarily to the force of competition.

Essentially appellant's grievance is against the order fixing a minimum price which it must pay producers for milk. But the power to fix such a minimum price can scarcely be questioned since the decision of *Nebbia v. New York*, 291 U. S. 502. The attack must be upon the reasonableness of the minimum price fixed. As we shall show below, under Point III, there are good reasons why appellant should not be heard now and in this proceeding to complain about that. Ignoring those for the present, appellant does not support such an attack otherwise than by the inference derived from its own failure to make a profit. We submit that a constitutional case is not made out so easily. Why does appellant infer that its loss is a direct result of only one factor in its costs? Apparently because it is a novelty to have that cost fixed. Appellant does not allege its labor costs or taxes or freight rates as a constitutional grievance. In the last analysis appellant's complaint is that for many years the full incidence of every business trouble in the milk industry has been put upon and borne by the dairy farmer, and he has borne those troubles so many years that now it is a constitutional right of the milk dealer to have him continue to bear them.

POINT II.

The Statute was not unconstitutional in any matter of which the appellant can complain.

Point II of appellant's brief revolves around section 312 (g) of the 1933 milk control law, which forbids

the sale within New York State of milk produced without the State unless the out-of-the-state producers are paid the prices fixed for payment to New York State producers equally distant from market, etc. This provision is qualified by some legislative protestations that there is no intention to interfere with interstate commerce, and that the provision shall be applicable only after the interstate milk, "shall have come to rest within the state", and its handling "becomes a subject of regulation by the state in the exercise of its police powers". What that language means in the light of the Commerce Clause probably will come before the Court within two or three months. In the case of *G. A. F. Seelig, Inc. v. Baldwin*, 7 F. Supp. .... (U. S. Dist. Ct., S. Dist. N. Y., Aug. 2, 1934, opinion by Circ. Judge Learned Hand) it was held that the provision was inapplicable to milk in the original cans used for shipment, but was applicable to bottled milk, and an appeal has been taken to this Court.

There is no need at present to discuss the question. Appellant can claim no direct grievance, because it buys milk only within New York State. It should not complain about the grievances of others. *Herbring v. Lee*, 280 U. S. 111. Its bill of complaint (R. 4-12) does not even refer to what is now asserted as a grievance. Neither does its assignment of errors (R. 61, 59-60). It cannot make out a constitutional grievance indirectly, although 30 per cent of the milk consumed in New York City comes from without the State and hence (appellant says) is unregulated as to its price at the point of origin. To the extent that the minimum retail price protects it appellant cannot be harmed by the alleged good fortune of some of its competitors.

Even if appellant could show that it is harmed we doubt if it would be held a violation of Due Process for New York State to regulate the 70 per cent of milk within its jurisdiction and leave unregulated because it must the 30 per cent which is of extra-state origin.

We respectively submit that the very interesting questions involved in the *Seelig* case should wait for argument and decision until they are brought directly before the Court. They are not properly any part of this appellant's case.

POINT III.

No claim is made that the appellant waived its right to attack the constitutionality of the orders merely by applying for a license under the statute. In some other respects it has waived and estopped itself.

The nature of our point below, which is referred to in appellant's present brief at page 43, will be indicated more accurately by the following paragraph which introduced it:

> "It is arguable that plaintiff, having sought a license under this statute and having enjoyed the benefit of having its competitors restrained under it, is estopped to question its constitutionality [citing cases, including United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 307-308]. At least it is clear that the plaintiff should not be welcomed in a court of equity when it has availed itself of benefits under the statute, promised by its application to obey the orders of the Board, been caught paying less than the minimum prices to producers fixed by such an order, and now in-

> terposes this suit to avoid making the payment to which it has no defense except constitutional ones."

So far as appellant's case now is based upon the proposition that one or the other or both prices fixed by orders of the Board is unfair and unreasonable, we are clear that it was not waived merely by applying for a license or even by promising in the application to abide by the orders to be made (R. 29, "B"). Nobody could know then how reasonable or otherwise the orders would be. The most we might claim is that appellant thereby waived the right to complain about parts of the statute having an obvious relation to its own business. Compare, the procedure of *Borden's* in challenging the "unadvertised differential" provision before applying for a license, and of *Seelig* in challenging the interstate provision before applying for a license. In the present case we have no need to make that claim and shall not argue it.

The milk control law, section 312 (f), provided that the Board could make a price order only after a public hearing upon reasonable notice. Then it provided as follows:

> "Such an order of the board may be reviewed by certiorari order at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order."

Appellant does not assert that it pursued even the administrative part of the remedy, and in opposition it is asserted that the appellant has done nothing along that line (R. 30, "C"). The most recent order fixing

the minimum price to producers had been in effect from July 21, 1933, or more than six months when this suit was started. It does not appear that the appellant ever had protested about it. To and including September, 1933, it filed reports which purported to show that it paid its producers the established price, but audits revealed that it was paying less, and it was ordered to make up the difference (R. 33-34, "G"; 6-7, 14). Then it was, and not until then, that the appellant claimed refuge in a Federal court of equity and asserted constitutional authority for what it had done by stealth.

We respectfully submit that the appellant should have pursued its administrative remedies provided by statute before seeking the aid of a federal court of equity (*Gorham Mfg. Co. v. Tax Comm.*, 266 U. S. 265; *Chicago, etc. Co. v. Risty*, 276 U. S. 567), and that it should not have pretended to be obeying the orders while really disobeying them; its conduct should disentitle it to relief on constitutional grounds in a court of equity.

FINALLY.

It is respectfully submitted that the decree below should be affirmed, or the appeal dismissed.

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